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APPLICABLE LAW AND GENERAL PRINCIPLES OF LAW

Working paper submitted by Canada

CONTENTS

		Page
I.	INTRODUCTION	3
II.	DRAFT ARTICLES AND EXPLANATORY NOTES	5
Article 33.	Applicable law	5
Article 33-1.	Nullum crimen sine lege	5
Article 33-2.	Statutory limitation of time	6
Article 33-3.	Individual and State responsibility	7
Article 33-4.	Principle of criminal responsibility of principals	7
Article 33-5.	Physical elements of crime	8
Article 33-6.	Mental elements of crime	10
Article 33-7.	Responsibility of other persons in the completed crimes of principals	11
Article 33-8.	Attempt	12
Article 33-9.	Conspiracy	13
Article 33-10.	Command responsibility	15
Article 33-11.	Age of responsibility	16
Article 33-12.	Insanity/diminished mental capacity	17

96-19942 (E) 130896 140896

CONTENTS (continued)

		Page
Article 33-13.	Intoxication	18
Article 33-14.	Mistake of fact or law	19
Article 33-15.	Self-defence and defence of others	20
Article 33-16.	Necessity	21
Article 33-17.	Duress/coercion	22
Article 33-18.	Superior orders	23
Article 33-19.	Defences under public international law	24
Article 33-20.	Other defences	24
III.	ADDITIONAL NOTES TO PART B OF DOCUMENT A/AC.249/CRP.9 OF 4 APRIL 1996	26

I. INTRODUCTION

In April 1996, the first session of the Preparatory Committee on the Establishment of an International Criminal Court was held in New York. Various proposals were made by delegates regarding applicable law, general principles of criminal liability and defence, and the elaboration by the court of these general principles; see document, *General principles of criminal law*, A/AC.249/CRP.9, 4 April 1996 (hereinafter referred to as "General Principles (April)"). The *General Principles (April)* document does not attempt to reconcile the various proposals, but lists them for further discussion.

In an effort to advance this discussion, the present document sets out possible formulations of the principles of liability and defence. Within the context of a coherent framework of articles, the formulations are a construction, or re-compilation, of all of the proposed components of the principles as made by delegates in New York in April 1996. Where possible, components of the proposals in the *General Principles (April)* document are merged into one article or paragraph in the present document. However, no attempt is made to reconcile or to come to a compromise on the proposals where there are differences in substance. Rather, the different proposed components of the principles are set off from each other in square brackets. This should assist in the contrast and comparison of each proposed component. It should clarify where consensus already exists with respect to the components (or at least where no opposition has yet been expressed) and demonstrates the options where the proposals differ. Some words or phrases are set off in parentheses, which signifies options that are more in the nature of form than substance. Additionally, changes in grammar and form have been made to the various proposals in order to achieve a consistent style.

This exercise of construction or compilation was achieved for the following principles:

Nullum Crimen Sine Lege
Individual and State Responsibility
Criminal Responsibility of Principals
Physical Elements of Crime
Mental Elements of Crime
Responsibility of Other Persons in the Completed Crimes of Principals
Attempt
Conspiracy
Command Responsibility
Age of Responsibility
Insanity/Diminished Mental Capacity
Self-Defence and Defence of Others
Necessity
Duress/Coercion
Superior Orders

For the remaining principles, the various proposals put forward at the first session in New York were too different in substance to make a re-compilation of them a useful exercise. These remaining principles appear in this document as they did in the document *General Principles (April)*.

All the notes and questions that appear in *General Principles (April)* document appear in this document as well.

The structure of the present document reflects how the principles might appear if they were a part of the Statute. It is noted that no consensus was reached at the first session as to whether general principles should be included as a part [IV bis] of the draft statute or attached as an annex. For the purpose of promoting discussion, the present document has been drafted so as to provide a General Part within the Statute, although this can be easily changed.

Also, in April 1996 there was no consensus on the order in which the principles should appear.[1] The present document has been drafted in a manner that would hopefully avoid needless academic debate. The first grouping of principles sets out a number of general preliminary issues, such as the principle of legality and periods of limitation. Next follow a group of articles concerning the various modes and principles of criminal responsibility. Finally, all defences, exculpations, justifications and excuses are grouped together at the end, in order to avoid unnecessary debate as to the character of a defence (i.e., whether a defence should be classified as a justification as opposed to an excuse, etc.). However, the articles could be re-arranged if desired.

A first draft of this document was considered at an informal meeting held in Siracusa, Italy, in July 1996, which was attended by a number of representatives of Member State delegations that have participated in the Preparatory Committee In addition to the notes and questions contained in the *General Principles (April)* document, which are reproduced in the present document, this document also contains additional notes and questions that were raised at the July meeting which will be useful to assist the Preparatory Committee in examining the issues.

While prepared by the Department of Justice, Canada, any views or proposals expressed in this document do not necessarily represent the views of the government of Canada or its departments. This document was prepared for the purpose of aiding discussion of the various proposals that were put forth in New York in March-April 1996.

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[1] General principles of criminal law, A/AC.249/CRP.9, p. 1.

II. DRAFT ARTICLES AND EXPLANATORY NOTES

ARTICLE 33
APPLICABLE LAW

*[See the Annex to this document, which is reproduced from the paper on **General principles of criminal law** (pages 20-23), prepared at the first session of the Preparatory Committee on the Establishment of an International Criminal Court (A/AC.249/CRP.9, 4 April 1996). This annex discusses various options concerning applicable law and the elaboration by the court of general principles of criminal law.]*

GENERAL PRINCIPLES OF CRIMINAL LAW

ARTICLE 33-1
NULLUM CRIMEN SINE LEGE

1. [Provided that this Statute is applicable in accordance with article 21, 22 or 23] a person shall not be criminally responsible under this Statute:

(a) in the case of a prosecution with respect to a crime referred to in article 20 (a) to (d), unless the conduct in question constituted a crime under international law [under the definition of the crimes of this Statute] [or by national law which is in accordance with international law] at the time that the conduct occurred and such conduct occurred after the entry into force of this Statute;

(b) in the case of a prosecution with respect to a crime referred to in article 20 (e), unless the treaty in question was applicable to the conduct of the person at the time that the conduct occurred.

2. Paragraph 1 [1(a)], above, shall not affect the character of such conduct as being crimes under international law, apart from this Statute.

3. If the law as it appeared at the commission of the crime is amended prior to the final judgment in the case, the most lenient law shall be applied.

Note:
The above approach might be compared to that adopted in the Statute of the Tribunal for the former Yugoslavia (article 2) and the Statute of the Rwanda Tribunal (article 1). Thought should be given to the possibility of concurrent temporal jurisdiction of the international criminal court and the ad hoc Tribunals.

A question was raised as to whether the term "international law" in paragraph 1(a)

needed to be clarified. Is it clear that the Statute's definition of a crime would be sufficient and exclusive for the purpose of establishing "a crime under international law" within the meaning of paragraph 1(a), and that for the purposes of determining whether conduct constitutes a crime for this article, no reference need or should be made to other sources of international law, such as other conventions or customary international law? If it is not clear, should the paragraph refer to crimes as defined by the Statute?

Is a reference in paragraph 1(a) to national law necessary if all crimes within the jurisdiction of the Court are defined by the Statute?

Should paragraph 1(b) also be qualified by the addition of the words "and such conduct occurred after the entry into force of this Statute", as in paragraph 1(a)?

ARTICLE 33-2
STATUTORY LIMITATION OF TIME

Text from A/AC.249/CRP.9

i) Proposal submitted by Japan (VII.1)

"1. The period of limitations shall be completed upon the lapse of xx years for the offence of .., and yy years for the offence of ...

"2. The period of limitations shall commence to run at the time when criminal conduct has ceased.

"3. The period of limitations shall cease to run on the institution of the prosecution against the case concerned to this Court or to a national court of any State which has jurisdiction on such case. The period of limitations begins to run when the decision of the national court becomes final, where this Court has jurisdiction over the case concerned."

ii) Siracusa draft (33-18)

"There is no statute of limitations for those crimes within the [inherent] jurisdiction of the [Tribunal]."

Note:
With regard to the Siracusa draft, some delegations observed that for any crimes which are not within the inherent jurisdiction of the court, the court itself should determine the statute of limitations. Some delegations observed that no statute of limitations should apply. Other delegations observed that it should.

Other Proposals:

[There is no statute of limitations for those crimes within the [inherent] jurisdiction of the Court;

but [for those crimes not within the Court's inherent jurisdiction] the Court may decline to exercise jurisdiction if, due to the lapse of time, a person would be denied a fair trial.[1]]

ARTICLE 33-3
INDIVIDUAL AND STATE RESPONSIBILITY

1. The Court shall have jurisdiction over [natural] persons pursuant to the provisions of this Statute.

2. A person who commits a crime under this Statute is individually responsible and liable for punishment.

3. The official position of a person who commits a crime under this Statute, particularly whether the person acts as head of State or of government or as a responsible government official, shall not relieve that person of criminal responsibility nor mitigate punishment.

4. Criminal responsibility for persons under this Statute shall not prejudice [affect] the responsibility of States under international law.

Note:
The question of the criminal liability of corporations or other legal persons may need to be considered.

ARTICLE 33-4
CRIMINAL RESPONSIBILITY OF PRINCIPALS

1. A person is criminally responsible as a principal and is liable for punishment for a crime under this Statute if the person, with the mental element required for the crime:

a) commits the conduct specified in the description (definition) of the crime;

b) causes the consequences, if any, specified in that description (definition); and

c) does so in the circumstances, if any, specified in that description (definition).

2. Where two or more persons jointly commit a crime under this Statute with a common intent to commit such crime, each person shall be criminally responsible and liable to be punished as a principal.

Note:
This article establishes the general principle regarding the liability of principal

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[1] *See A/AC.249/CRP.3/Add.1, 8 April 1996, p.2-3; this proposal is based on the plenary discussion at the first session of the Preparatory Committee and the Note to Siracusa draft, above.*

perpetrators of a crime. Further elaboration of the elements of this general principle, such as "mental element", "conduct" and causation, are elaborated in articles 33-5 and 33-6.

Other persons who participate in the commission of a crime under this Statute would be criminally responsible and liable for punishment in the manner provided in Articles 33-7, 33-8 and 33-9 [and 33-10] of this draft general part.

A question was raised whether this article is required, and whether it would be sufficient merely to state that a person who commits a crime under the Statute is criminally responsible and liable for punishment? On the other hand, it was noted that specificity of the essential elements of the principle of criminal responsibility was important; it serves as a foundation for many of the other subsequent principles and avoids the need to elaborate defences within the Statute which merely constitute negations of the existence of essential mental or physical elements.

It was noted that the choice of using the word "description" or "definition" was dependant upon answering the question whether the definition of crimes would be solely within the Statute (in which case the term "definition" would be appropriate) or whether further elaboration of the elements of the definition of a crime in the Statute might be contained in an annex (in which case the term "description" might be appropriate given that this term could encompass both the statutory definition and the annexed elaboration of elements).

ARTICLE 33-5
PHYSICAL ELEMENTS OF CRIME

1. Conduct for which a person may be criminally responsible and liable for punishment as a crime under this Statute can constitute either an act or an omission, or combination thereof.[2]

2. For the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission if:

a) the omission is specified in the description of the crime, and the person could have, but [intentionally or knowingly] failed to avoid the omission: or

b) in the circumstances

(i) the person is under a [pre-existing] legal obligation (duty) to avoid the consequences specified as an [constituent; material] element in the description of a crime;

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[2] *New proposal. This paragraph would link the concepts of act and omission with the concept of "conduct" to which reference is made in article 33-4, and would provide a conceptual link for paragraph 2 of article 33-5.*

[Alternative: (i) the person is under a [pre-existing] legal obligation (duty) to avoid the result of a crime;]

(ii) the consequence caused [result realized] by the omission corresponds to the consequence [result] that would be caused [realized] by a commission of such crime by means of an act; and

(iii) the person could have, but [intentionally or knowingly] failed to avoid the consequences [results] of such crime.

[3. A person is only criminally responsible under this Statute if the harm required for the commission of a crime is caused by and accountable to the principal's (perpetrator's) act or omission (conduct).]

Note:
The concept of "omission" presents particular problems to various legal systems.

The extent to which the concept of omission could raise the question of liability may be considered.

Delegations may wish to omit these two elements [i.e., omissions and causation] from the statute.

Regarding paragraphs 2 a) and b)(iii), it was questioned whether references to "intentionally or knowingly" were necessary in light of the subsequent article concerning mental elements, which requires proof of intent or knowledge as the general rule. On the other hand, it was noted that it should be made clear that a failure to avoid an omission due to negligence is insufficient for criminal liability, thereby, possibly justifying the retention of these words.

Regarding paragraph 2 b)(ii), a question was raised as to the origin of the legal obligation or duty to avoid the consequences or result of a crime. Does this obligation arise only by way of the Statute, or might the obligation arise by virtue of other sources of international or national law? Should it be clarified that any legal obligation must be an obligation pursuant to the Statute?

Also regarding paragraph 2 b), the draft proposals raise the question whether the obligation is to avoid the "consequences" specified in the definition of the crime or to avoid the "result" of a crime (which may be a broader concept and may include crimes of conduct that have no separate consequences)?

Regarding paragraph 3, it was questioned whether the draft should specify that the "act or omission" be voluntary. Others thought that this was not necessary, as voluntariness was addressed by the principles concerning mental elements in article 33-6.

A question was raised as to whether liability in respect of omissions should be limited only to specific crimes as defined by the Statute.

ARTICLE 33-6
MENTAL ELEMENTS OF CRIME

1. Unless otherwise provided, a person is only criminally responsible and liable for punishment for a crime under this Statute if the physical elements are committed with intent or knowledge [,whether general or specific or as the substantive crime in question may specify].

2. For the purposes of this Statute and unless otherwise provided, a person has intent where:

a) in relation to conduct, that person means to engage in the act or omission;

b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this Statute and unless otherwise provided, "know", "knowingly" or "knowledge" means:

a) to be aware that a circumstance exists or a consequence will occur; or

b) to be aware that there is a substantial likelihood that a circumstance exists and deliberately to avoid taking steps to confirm whether that circumstance exists.

[4. For the purposes of this Statute and unless otherwise provided, where this Statute provides that a crime may be committed recklessly, a person is reckless with respect to a circumstance or a consequence if:

a) the person is aware of a risk that the circumstance exists or that the consequence will occur; and

b) the person is aware that the risk is highly unreasonable to take.]

Note:
The concepts of recklessness and *dolus eventualis* should be further considered in view of the seriousness of the crimes considered.

Therefore, paragraph 4 would provide a definition of "recklessness", to be used only where the Statute explicitly provides that a specific crime or element may be committed recklessly. In all situations, the general rule, as stated in paragraph 1, is that crimes must be committed intentionally and knowingly.

It was questioned whether further clarification might be required to the above definitions of the various types and levels of mental elements. It was noted that this could occur either in the General Part, in the provisions defining crimes or in an annex.

It was questioned whether it was necessary in paragraph 1 to make reference to

general and specific intent, as in either case the general rule would be that intent or knowledge is required.

Likewise, it was noted that any reference to "motive" should not be included; if relevant, motive or purpose would be an integral element of the definition of a crime.

ARTICLE 33-7
RESPONSIBILITY OF OTHER PERSONS IN THE COMPLETED CRIMES OF PRINCIPALS

[1. A person who [plans,] aids, abets or solicits the commission of a crime under this Statute is criminally responsible and liable for punishment in accordance with that person's own individual responsibility apart from the responsibility of other participants.[3]]

[2. A person who plans the commission of a crime under this Statute, which is committed by that person or another person, is criminally responsible and liable for punishment [shall be liable to the same punishment as provided in this Statute for a person who commits such crime as a principal].][4]

[3. A person may only be criminally responsible for planning the commission of a crime where so provided in this Statute.]

4. A person solicits the commission of a crime if, with the purpose of encouraging another person [making another person decide] to commit [or participate in the commission of] a specific crime, the person commands, [orders], requests, counsels or incites the other person to engage [or participate] in the commission of such crime, and the other person commits a crime [or is otherwise criminally responsible for such crime] as a result of such solicitation.

5. A person who solicits the commission of a crime is criminally responsible and liable for punishment [shall be liable to the same punishment as provided in this Statute for a person who commits such crime as a principal.]

6. A person aids or abets the commission of a crime if the person does anything for the purpose of facilitating the commission of such crime by another person.

7. A person who aids or abets the commission of a crime is criminally responsible and liable for punishment {shall be liable to [a reduced punishment][to the same punishment as

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[3] *General Principles (April) p. 4 & 5: Statute of the former Yugoslavia Tribunal, and Siracusa draft (March 1996). Note: references to "instigates" and "orders" have been deleted from those proposals as these concepts are now addressed by article 33-7, paragraph 4. References to "attempt" and "commits" have also been deleted as these are addressed by articles 33-3, 33-4 and 33-8.*

[4] *General Principles (April) p. 5: see Explanatory note from the Japanese delegation. See also "Conspiracy", article 33-9, Infra.*

provided in this Statute for a person who commits such crime as a principal]}.

Note:
The importance of being able to punish the planners was recognized. Under this article, planners are punishable only if a principal actually committed a crime as a result of such planning or soliciting.[5] An alternative way of addressing the situation of planners is through the concept of "conspiracy"; see Article 33-9 and notes relating to "conspiracy", below.

It was questioned whether paragraph 1 was redundant and should be deleted in light of the specific paragraphs that followed, which in greater detail describe the forms of participation, responsibility and liability for punishment.

A question was raised whether a person who solicits another person to commit a crime should be responsible and liable not only if the other person commits the crime that was solicited but also for any other crime that the other person committed which the solicitor foresaw (or reasonably could foresee) would be committed as a result of the solicitation.

A question raised by the draft proposals is whether a person should be liable as a solicitor only if the person solicits another to be a principal perpetrator or whether the person should also be liable for soliciting another person to participate in its commission as an aider and abettor, (i.e. "otherwise criminally responsible").

It was questioned whether the Statute (in a new and separate article?) should also criminalize and punish a person in the situation where that person solicits another person to commit or criminally participate in a crime, but the other person does not commit the crime.

It was also questioned whether the Statute (in a new and separate article?) should also criminalize and punish persons who aid and abet another person after the commission of a crime; (e.g., aiding a person to escape detection or arrest, or destroying or concealing evidence).

It was suggested that provisions concerning the quantum of sentence should not be included in the General Part, but be located elsewhere in the Statute.

ARTICLE 33-8
ATTEMPT

1. A person is criminally responsible and is liable for punishment for attempting to commit a crime if, with the intent to commit that crime, the person ...

[engages in conduct for the purpose of carrying out that intent which is more than mere

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5 *General Principles (April) p. 5: Explanatory Note from the Japanese delegation.*

preparation to commit the crime]

[engages in conduct constituting a substantial step towards the accomplishment of such crime]

[commences execution of the crime]

..., but fails to complete the commission of the crime due to [circumstances independent of that person's will] [or a fortuitous event], [or the object of the attempt is impossible to achieve].

[2. A person shall only be criminally responsible for attempting to commit a crime where so provided in this Statute.]

3. A person who is criminally responsible for attempting to commit a crime may be liable to [a reduced punishment].

[4. If the person abandons his or her efforts to commit the crime or otherwise prevents the accomplishment of the crime, the person is not punishable if the person completely and voluntarily has given up his or her criminal purpose before the crime was committed.]

Note:
With regard to the Siracusa draft [i.e., paragraph 4, above]: it was noted that some jurisdictions do not recognize "abandonment" as a defence. Questions were raised whether the concept of "abandonment" should be included in the definition of "attempt", or should be dealt with separately in the statute.

It was observed that an intervening event might break the chain of causation.

It was observed that the three alternatives in paragraph 1 were not mutually exclusive and could be combined as: "commences execution of the crime by engaging in conduct for the purpose of carrying out that intent, which is more than mere preparation and constitutes a substantial step towards the accomplishment of such crime".

It was questioned whether the three proposed reasons in paragraph 1 for the failure to complete the commission of a crime were mutually exclusive, or could be combined.

It was observed that the offence of attempt could apply generally to all crimes.

A question was raised as to when mitigation of punishment for an attempt was appropriate and whether such mitigation should only be for certain crimes.

[ARTICLE 33-9
CONSPIRACY]

[1. A person is criminally responsible and is liable for punishment for conspiracy if that

person [with the intent to commit a specific crime] agrees with one or more persons to perpetrate that crime [or that a common intention to commit a crime will be carried out] and an overt act is committed by that person [or by another party to the agreement] [for the purpose of furthering the agreement] [that manifests the intent].]

[2. A person is guilty of conspiracy even if the object of the conspiracy is impossible or is prevented by a fortuitous event.]

[3. A person shall only be criminally responsible for conspiracy in respect of a crime where so provided in this Statute.]

[4. A person who is criminally responsible for conspiracy is liable for the same punishment as the person who committed or would have committed the crime as a principal.][6]

Note:
See also article 6.1 of the Rwanda Statute.

It was noted that there were conceptual differences concerning conspiracy among the different legal systems.

The question was raised whether a "planner" should be punished when the crime was not completed, yet action had been taken to implement the plan.

Some delegations questioned whether this concept should be included in the General Part of the statute, although it might be necessary to punish such conduct in cases of exceptionally serious crimes. (See the explanatory note by the Japanese delegation)[7]. Others thought that it would be retrogressive not to include it since it was a form of liability at the Nürnberg trials.

It was questioned whether, in the situation where the crime agreed upon is actually committed, would the crime of conspiracy merge with the completed crime or remain a distinct and separate crime? If the conspiracy were merged with the completed crime, should a conspirator also be responsible for other foreseeable crimes that may have been committed in carrying out the conspiracy? (If the conspiracy remained a distinct crime, the conspirator would only be responsible (absent any other mode of participation) for a conspiracy to commit the crime that was agreed to be committed, as this is the subject matter of the unlawful agreement.)

Questions arising from the proposed drafts include: a) whether the accused conspirator must have an intent to commit the crime or whether it is sufficient that there is an intention that a crime be carried out and that others might be the actual committers; b) whether the accused conspirator must commit the overt act or whether it is sufficient if one of the other co-conspirators commits the overt act; c) what must be the nature of

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6 *New proposal to parallel other proposals concerning punishment.*

7 *General Principles (April) p. 5.*

the overt act (e.g., the act is undertaken for the purpose of furthering the agreement or must it actually manifest the agreement); d) whether a conspiracy exists even if the object of the conspiracy is factually impossible to achieve; e) whether conspiracy should be limited in respect of an agreement to commit certain listed crimes; and, f) the appropriate punishment for the crime.

ARTICLE 33-10
COMMAND RESPONSIBILITY

Alternative A. (Basis of Liability)

In addition to other (types of complicity)(modes of participation) in crimes under this Statute, a commander [a superior][8] is also criminally responsible (as an aider or abettor) for such crimes committed by forces under his or her command [by a subordinate][9] as a result of the commander's [the superior's] failure to exercise proper control where:

a) the commander [superior] either knew or, due to the widespread commission of the offences, should have known [had reason to know][10] that the forces were [subordinate was] committing or intending [about][11] to commit the offences [such acts][12], and

b) the commander [superior] failed to take all necessary [and reasonable][13] measures within the power of the commander [superior] to prevent or repress their commission [or to punish the perpetrators thereof].[14]

Alternative B. (No Immunity)

The fact that a crime under this Statute was committed by a subordinate [forces under the command of a commander] [as a result of the commander's failure to exercise proper control] does not relieve the superior [the commander] of criminal responsibility where the superior [commander] either knew or, [due to the widespread commission of the offences], had reason to know [should have known] that the subordinate was [forces were] committing or intending [about][15] to commit the offences [such acts] and the

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8 *General Principles (April) p.14: Statute of the former Yugoslavia Tribunal, article 7, paragraph 3.*

9 *Ibid.*

10 *Ibid.*

11 *General Principles (April) p. 14: Statute of the former Yugoslavia Tribunal, article 7, paragraph.*

12 *Ibid*

13 *Ibid.*

14 *General Principles (April) p. 14: Statute of the former Yugoslavia Tribunal, article 7, paragraph 3.*

15 *General Principles (April) p. 14: Statue of the former Yugoslavia Tribunal, article 7, paragraph 3.*

superior [commander] failed to take all necessary [and reasonable][16] measures [within the power of the superior [[commander][17]] to prevent [or repress] their commission [or to punish the perpetrators thereof].[18]

Note:
The major question raised by the two alternatives is whether command responsibility is a form of criminal responsibility in addition to other modes of participation and complicity, or whether it is a principle that commanders or superiors are not immune for the acts of their subordinates.

Another significant question raised is whether the principle of command responsibility should be restricted to military commanders or be extended to any superior in respect of the actions of subordinates.

What should be the level of knowledge or foresight required of a commander or superior with respect to the actions of subordinates, and what should be the subject of this knowledge?

What type of action, the failure of which leads to liability, should be required of the commander/superior (e.g. necessary or reasonable measures to prevent, repress or punish?)

ARTICLE 33-11
AGE OF RESPONSIBILITY

1. A person under the age of [twelve, fourteen, sixteen] at the time of the (alleged) commission of a crime [shall be deemed not to know the wrongfulness of his or her conduct and] shall not be criminally responsible under this Statute, [unless the Prosecutor proves that the person knew the wrongfulness of his or her conduct at that time].

2. A person who is between the age of [sixteen] and [twenty-one] at the time of the (alleged) commission of a crime shall be evaluated (by the Court) as to his or her maturity to determine whether the person is responsible under this Statute.

Note:
Different views exist among States as to a specific age of responsibility.

It was observed that many international conventions (such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Inter-American Convention on Human Rights) prohibit the punishment of minors.

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16 *Ibid.*

17 *General Principles (April) p. 14: Statue of the former Yugoslavia Tribunal, article 7, paragraph 3.*

18 *General Principles (April) p. 14: Statute of the former Yugoslavia Tribunal, article 7, paragraph 3.*

The question arising from the draft proposals was whether an absolute age of responsibility should be mandated or whether a presumptive age should be included with a means to rebut the presumption.

It was observed that a consistent approach (in terms of either an evaluation by the Court or proof by the Prosecutor) should be taken in paragraphs 1 and 2 in respect of both of the age groups mentioned.

A question was raised as to what would be the criteria of the evaluation process, and should this be left for the Court to develop in supplementary rules or by jurisprudence?

It was questioned whether the Statute should specify that mitigation of sentence should or could be appropriate for those minors who were found to be mature enough to be criminally responsible.

ARTICLE 33-12
INSANITY/DIMINISHED MENTAL CAPACITY

1. A person is not criminally responsible [is legally insane] if at the time of that person's conduct which (would otherwise) constitutes a crime, the person suffers from a mental disease or mental defect that results in the person lacking substantial capacity either to appreciate the criminality [unlawfulness] of his or her conduct or to conform his or her conduct to the requirements of the law [, and such mental disease or mental defect caused the conduct constituting a crime.]"

2. Where a person does not lack substantial capacity of the nature and degree mentioned in paragraph 1, but such capacity is nevertheless substantially diminished at the time of the person's conduct, the sentence shall [may] be reduced."

Note:
The question was raised whether this defence should be included.

The question was also raised whether a provision was required to deal with the issue of whether the accused is fit to stand for trial. That provision might be included in the chapter on trial/procedural rules.

The question was raised as to what should happen to a person who is found insane. Should the person be released or be detained in a mental institution? If the latter, where? Should provision for this be made in the articles concerning enforcement of sentences by the Court and State Parties?

It was observed that this defence might be more relevant for some crimes (e.g., a war crime, such as killing of a prisoner of war) than for others (e.g., crimes involving the formulation of policy, such as genocide). If the defence is included, possibly it should be available only for some types of crimes?

ARTICLE 33-13
INTOXICATION

Text from A/AC.249/CRP.9:

i) Siracusa draft (33-4.2)

"2. A person is intoxicated or in a drugged condition when under the effect of alcohol or drugs at the time of the conduct which would otherwise constitute a crime he is unable to formulate the mental element required by said crime. Such a defense shall not apply to a person who engages in voluntary intoxication with the pre-existing intent to commit a crime. With respect to crimes requiring the mental element of recklessness, voluntary intoxication shall not constitute a defense."

Note:
The point was made that there were essentially two questions:
(a) whether intoxication should be available as a defence or as a negation of mens rea; and
(b) if available as a defence, should it be spelled out in the Statute or elaborated in another way. (See section B below.)

It was observed that this defence might be relevant for some individual crimes (e.g., a war crime, such as killing a prisoner of war). On the other hand it was observed that it might be better to leave this defence to be resolved by the Court through its jurisprudence rather than to include such a defence in the Statute.

It was also observed that intoxication is merely a factor relevant to the existence of, or which may negated, a required mental element. In light of the proposed statutory requirements for the existence of particular mental elements in order to establish criminal responsibility (see articles 33-4 and 33-6), it was questioned whether such a defence need be explicitly mentioned as it is merely an example of one factor that could negate the existence of the required mental element.

Differences exist among national legal systems as to how intoxication is addressed, and other formulations of a defence could equally be suggested.

If the defence is available (either expressly by the Statute or by the Court's jurisprudence), should it be limited to only certain crimes?

Ability to stand for trial

This concerns insanity/old age/illness. It was noted that this type of defence should be dealt with under the procedural rules/chapter on trial.

ARTICLE 33-14
MISTAKE OF FACT OR LAW

Text from A/AC.249/CRP.9:

i) Proposal submitted by Japan (III.1)

"Mental element

"1. At the time of a conduct, if a person is not aware of the facts constituting an offence, such conduct is not punishable.

"2. Even if a person, at the time of a conduct, does not realize its unlawfulness, he/she is criminally responsible in the case unless such error is unavoidable; provided that the sentence may be reduced."

ii) Proposal submitted by the Netherlands

"Mistake of fact or of law

"Invincible (Unavoidable) mistake of fact or of law shall be a defence provided that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of fact or of law may be considered in mitigation of punishment."

iii) Siracusa draft (33-15)

"1. A mistake of law or a mistake of fact shall be a defence if it negates the mental element required by the crime charged provided that said mistake is not inconsistent with the nature of the crime or its elements, and provided that the circumstances he reasonably believed to be true would have been lawful.

"2. The person who commits a crime in the mistaken belief that he is acting lawfully is not punishable, provided that he has done everything under the circumstances which could reasonably be demanded of him to inform himself about the applicable law. If he could have avoided his mistake of law, the punishment may be reduced."

Note:
Some delegations expressed doubts over including these concepts in the Statute.

Doubts were also expressed as to whether these concepts are negations of responsibility or a defence.

In light of the proposed statutory requirements for the existence of particular mental elements in order to establish criminal responsibility (see articles 33-4 and 33-6), it was questioned whether this defence need be explicitly mentioned as it is merely one example of the various factors that could negate the existence of the required mental element.

It was questioned whether mistake of law should be permitted as a defence.

ARTICLE 33-15
SELF DEFENCE AND DEFENCE OF OTHERS

1. A person [is not criminally responsible and] is not liable for punishment if that person acts in self-defence or in defence of others.

2. A person acts in self-defence, or in defence of others, if the person acts [reasonably][and as necessary] [with the reasonable belief that force is necessary] to defend himself or herself, or another person, against a[n] [reasonable apprehension of] [imminent] [present] unlawful force or threatened unlawful force, [in a manner which is reasonably proportionate to the threat or use of force.]

[3. Self-defence, in particular defence of property, shall not exclude punishment if it causes damage disproportionate to the degree of danger involved or the interest to be protected by the defensive act.]

[4. If a person exceeds the limits of the justifiable defence as described in paragraph 2, the sentence may be reduced.]

Note:
Several questions were raised: (a) whether a provision relating to defence of property should be included in the Statute; (b) whether self-defence should be used as a defence in response to a threat of unlawful force; (c) whether pre-emptive self-defence is valid; (d) whether self-defence should be limited to certain types of crimes under article 20; and (e) whether or not self-defence should be allowed in specific cases, at the discretion of judges.

Other questions raised by the draft include the extent to which the availability of the defence should be limited by requirements of reasonableness, necessity and/or proportionality.

The question also arises as to whether the defence should be available only if the defensive action is actually necessary or whether it is sufficient if the accused, although honestly mistaken, reasonably believes that the defensive action is necessary.

The degree of responsibility and punishment for excessive use of force in self defence also arises as an issue.

ARTICLE 33-16
NECESSITY

1. A person [is not criminally responsible and] is not liable for punishment if that person acts due to necessity.

2. A person acts due to necessity if:

a) [the person reasonably believes that] there is a threat of [imminent][present][or otherwise unavoidable] death or serious bodily harm to [or a threat to the freedom of] that person or another person;

[alternative: a) circumstances beyond a person's control are likely to create an unavoidable private or public harm];

b) [the person acts reasonably to avoid the threat] [there exists no other way to avoid the threat]; (and)

c) [the person acts only to avoid greater imminent harm] [the interests protected by such conduct exceeds the interest infringed by such conduct].

[3. This defence does not include the use of deadly force.]

[4. A person does not act due to necessity if [the circumstances are (within) not beyond a person's control] [(or if) that person knowingly and without reasonable excuse has exposed himself or herself to the circumstances creating the necessity].]

[5. If a person exceeds the limitation of the justifiable defence as described in paragraph 2 [this article], the sentence may be reduced.]

Note:
The question was raised as to the crimes to which the defence of necessity might apply.

The question was also raised whether the defence of necessity should include the use of deadly force.

It was questioned whether the defence of necessity should apply to the crimes of genocide and crimes against humanity.

Other questions arising from the proposed drafts include: a) the degree of immediacy of the threat (e.g. present, imminent or otherwise unavoidable); b) the nature of the threatened harm to be avoided (e.g., serious bodily harm, death, freedom, or private or public harm); c) whether the defence should be available only if the threat actually exists or whether it is sufficient if the accused, although honestly mistaken, reasonably believes that the threat exists; d) whether the accused need only act reasonably to avoid the threat if there is more than one equally harmful means of avoidance or must

there be no other way to avoid the threatened harm other than by the accused's acts; e) the necessity for proportionality between the harm to be avoided and the harm caused by the accused; and f) what factors (such as voluntary exposure to the risk or control of circumstances) should deny the availability of the defence, and whether these are mutually exclusive or could be conjunctive.

ARTICLE 33-17
DURESS/COERCION

1. A person [is not criminally responsible and] is not liable for punishment if the person acts under duress or coercion.

2. A person acts under duress or coercion if:

[a) [the person reasonably believes that] there is a threat of [imminent] [present][or otherwise unavoidable] [unlawful] force or use of such force against that person or another person];

[a) [the person reasonably believes that] there is a threat of [imminent] [present][or otherwise unavoidable] death or serious bodily harm to that person or another person];

b) [the person acts reasonably in response to that threat] [the threat could not reasonably have been resisted by an ordinary person]; and

[c) the coerced conduct does not produce a greater harm than the one likely to be suffered (sought to be avoided) and is not likely to produce death].

[3. A person does not act under duress or coercion if that person knowingly and without reasonable excuse has exposed himself or herself to that duress or coercion].

Note:
Questions arising from the proposed drafts include: a) the degree of immediacy of the threat (e.g. present, imminent or otherwise unavoidable); b) the nature of the threatened harm to be avoided (e.g., force serious bodily harm, death,), and whether it need be unlawful; c) whether the defence should be available only if the threat actually exists or whether it is sufficient if the accused, although honestly mistaken, reasonably believes that the threat exists; d) whether the accused need only act reasonably to avoid the threat or whether no reasonable person could have resisted the threat; e) the necessity for proportionality between the harm to be avoided and the harm caused by the accused; f) whether causing death is a permitted response to a threat; and, g) what factors (such as voluntary exposure to the risk) should deny the availability of the defence.

[**Lesser of evils**

This defence, components of which appear under other defence's, may not need to be included in the Statute.]

ARTICLE 33-18
SUPERIOR ORDERS

1. The fact that a person acted pursuant to an order of a government or of a superior, [whether military or political], shall not relieve the person of criminal responsibility[19] [if the order appears to be manifestly unlawful][and the person has no alternative but to obey, or has no other moral choice].

2. Where the person has acted pursuant to an order of a government or of a superior in the circumstances as described in paragraph (1), the sentence may be reduced having regard to the circumstances [this fact may be considered in mitigation of punishment if the court determines that justice so requires].[20]

Note:
Three questions were raised:

(a) Should those troops who obey what appears to them at the time to be a manifestly lawful order, be criminally responsible if it transpires that their commander was acting illegally in giving the order?

(b) Should those troops who receive an order which is not manifestly lawful but simply lawful, be criminally responsible if it transpires that their commander was acting illegally in giving the order, and if they should have made further inquiries before obeying the order?

(c) What rules of law govern the legality or otherwise of an order?

It was also suggested that the defence not apply to the crimes of genocide and crimes against humanity. Should the defence be limited to only some types of crimes?

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19 *General Principles (April) p. 18: Statute of the former Yugoslavia Tribunal, article 7, paragraph 4.*

20 *General Principles (April) p. 19: Statute of the former Yugoslavia Tribunal, article 7, paragraph 4.*

ARTICLE 33-19
DEFENCES UNDER PUBLIC INTERNATIONAL LAW

Text from A/AC.249/CRP.9:

It was suggested to include the "Hafner list" as is:

- Military necessity;
- Reprisals;
- Article 51 of the Charter of the United Nations (cf. justifications in the International Law Commission draft on State responsibility)

Siracusa draft (33-13.3)

"3. Military necessity may exclude punishment only as provided by the international law of armed conflict."

Note:
It was questioned whether defences under public international law should be included in the General Part of the Statute, since they to a large extent relate to inter-State relations; whether a savings clause could be included in reference to the rights and duties of States under the Charter of the United Nations and the functions and powers of the principal organs of the United Nations under the Charter; and which set of rules governing reprisals should apply.

It was noted that most justifications for the use of reprisals have been eliminated under international law and, therefore, it would be counterproductive to permit such a defence in the Statute.

If defences under Article 51 were applicable, it was questioned whether these should be limited to only certain types of crimes (e.g., aggression, war crimes).

Given the trend in humanitarian law, it was questioned whether any of these defences should be available.

ARTICLE 33-20
OTHER DEFENCES

Text from A/AC.249/CRP.9:

Exhaustive or enumerative list of defences?

i) Proposal submitted by the Netherlands

"Notwithstanding the foregoing articles on defences the Court shall have the competence to take into account other defences, recognized by the country in the

territory of which the alleged crime has been perpetrated or by the law of the country the nationality of which the accused had at the time of the perpetration [commission]."

ii) Siracusa draft (33-11)

"1. The Court shall determine the admissibility of reasons excluding punishment in light of the character of each crime.

"2. Defences include but should not be limited to those in Article 33-12 to 33-17[of the Siracusa draft]."

Note:
Different views were held as to whether the list of defences should be exhaustive or enumerative. This leads to the question under section B below.

It was noted that if the nature of a defence was really the negation of a mental element, there was no need to specify that defence in the Statute. Further, it could be applicable by means of the savings clause as proposed in this article.

III. ADDITIONAL NOTES TO PART B OF DOCUMENT A/AC.249/CRP.9 OF 4 APRIL 1996

At the informal meeting held in Siracusa, Italy, in July 1996, a number of additional comments and questions were raised, in addition to those appearing in part B of the 4 April 1996 document entitled "General principles of criminal law" (A/AC.249/CRP.9). For the benefit of the Preparatory Committee, these are summarized below:

It is important that the major principles of crime law be included in the General Part, which is to be created by Member States as part of the Statute or an annex.

It was recognized that not all the relevant general principles of criminal law could be included in the Statute.

It was noted that there would need to be some mechanism to enable the Court to supplement the principles contained in the General Part.

It was acknowledged that the Court should not have the power to amend the general principles contained in the Statute (or annex), nor amend any Rules made by Member States that might accompany the Statute.

Some participants were of the view that the Court should be given the power to make judicial Rules to supplement (but not to amend) the General Part created by the Statute (as long as these Rules were not contrary to nor inconsistent with the General Part created by Member States). The question was also raised whether Member States should be required to approve or ratify these Rules. [Note: Part B of the *General Principles (April)* document contains some proposals to permit the making of judicial Rules.]

Other participants were of the view that the Court should not have any power to make formal Rules to supplement the General Part that would be contained in or annexed to the Statute. The Court should only be able to supplement (but not to amend) the general principles of the General Part by way of the normal jurisprudential process of reasoning on a case by case basis. [Note: Part B of the *General Part (April)* document contains some proposals that would guide or restrict how the Court should undertake this process.]